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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BERNARD I. SEGAL,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,

Defendant and Respondent,

PLAYA GRANDE, LLC,

Real Party in Interest and
Respondent.

D072215

(Super. Ct. No. 37-2015-00037498-
CU-TT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

Dentons US and Charles A. Bird for Plaintiff and Appellant.

Mara Elliot, City Attorney, Glenn T. Spitzer and Heidi Vonblum, Deputy City Attorneys, for Defendant and Respondent.

Varco & Rosenbaum Environmental Law Group, Suzanne R. Varco and Jana Mickova Will for Real Party in Interest and Respondent.

Bernard I. Segal appeals a judgment denying his Code of Civil Procedure section 1094.5¹ petition for writ of mandate that challenged a decision by the City of San Diego (City) approving construction of a building proposed by real party in interest Playa Grande, LLC, in the community of La Jolla Shores and certifying the final environmental impact report (FEIR) for that project. On appeal, Segal contends that the City: (1) violated section 113.0273 of the San Diego Municipal Code (Municipal Code) by approving the project without requiring visibility triangles;² (2) City violated the requirement of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) for meaningful public participation because Municipal Code section 1510.0301, subdivision (b) does not provide any floor area ratio maximum for development within the La Jolla Shores Planned District; and (3) City violated CEQA because its FEIR did not adequately address the cumulative impacts of the project. Based on our reasoning *post*, we conclude the trial court correctly denied the petition for writ of mandate.

¹ Undesignated references are to the Code of Civil Procedure.

² A visibility triangle is a triangular area without structures that allows adequate sight distance for safe vehicle and pedestrian movement at intersections with a public right-of-way. (Mun. Code, § 113.0273.)

FACTUAL AND PROCEDURAL BACKGROUND

In 2009 Playa Grande applied for a site development permit, coastal development permit, and tentative map waiver to demolish an existing 1,519-square-foot single-story residential building and an existing 1,538-square-foot single-story commercial building and construct a new three-story mixed-use building (Project) in the community of La Jolla Shores. The Project's site encompasses two lots totaling 3,952 square feet and is surrounded by mixed-use, commercial, office, and multi-family residential development. The Project will include 1,867 square feet of ground floor retail space, a 3,179-square-foot second floor condominium, a 2,780-square-foot third floor condominium, and 3,257 square feet of underground parking. The Project will be set back 10 feet from its eastern neighbor, a three-story mixed-use building. The Project will include a 15-foot by 15-foot entry plaza/visibility triangle at its southwest corner located at the intersection of Avenida de la Playa and El Paseo Grande and a visibility triangle at its northwest corner located at the intersection of El Paseo Grande and Calle Clara. An open carport accessed from Calle Clara will be located at the Project's northwest corner and underground parking for the condominiums will be accessed from Calle Clara through mechanical garage doors and two car elevators.

In 2009 City prepared an initial study under CEQA for the Project. In 2010 a mitigated negative declaration (MND) was completed and circulated for public comment. A City hearing officer adopted the MND and approved the Project's entitlements. City's planning commission (Planning Commission) denied an appeal, adopted the MND, and approved the Project's entitlements. After the San Diego City Council (City Council)

granted an appeal from that decision, the Planning Commission again adopted the MND and approved the Project's entitlements. The City Council granted a second appeal, finding there was substantial evidence that the Project might have significant environmental impacts. Thereafter, Playa Grande revised the Project by reducing its total square footage, adding car elevators, increasing setbacks, and modifying its design.

In June 2011 City issued a notice of preparation and received public comments. In 2013 City prepared a draft environmental impact report and circulated it for public comment. City responded to the public comments in the FEIR, which it circulated in 2015. As a result of public comments, the Planning Commission required further modifications to the Project, including a 15-foot setback on its eastern side. In April 2015 the Planning Commission certified the FEIR and approved the Project's entitlements. In October 2015 the City Council denied an appeal and approved certification of the FEIR.

In November 2015 Segal filed the instant petition for writ of mandate and complaint for declaratory and injunctive relief, alleging City failed to proceed in the manner required by law by violating CEQA and/or the Municipal Code. Segal sought writs of mandate ordering City to set aside its certification of the Project's FEIR and its approval of the Project. City and Playa Grande filed a joint opposition to the petition. Following oral argument, the trial court ruled in City's favor, finding: (1) City properly concluded the Municipal Code does not require visibility triangles for the Project; (2) the FEIR adequately addressed the Project's cumulative impacts; and (3) Segal was not a property owner who could allege that City engaged in unlawful spot zoning. On

February 21, 2017, the court entered judgment for City on the petition. Subsequently, the court denied Segal's motion to vacate the judgment and, in the alternative, for a new trial.³

In December 2017 Segal filed a motion for judicial notice, requesting that we take judicial notice of five exhibits attached thereto.⁴ City and Playa Grande opposed that motion. On December 20 we issued an order stating that we would consider the motion for judicial notice concurrently with this appeal. Because those exhibits should have been, but were not, presented to the trial court and did not exist at the time of City's October 2015 decision, we now decline to exercise our discretion to take judicial notice of those exhibits and deny Segal's motion for judicial notice of exhibits 1, 2, 3, 4, and 5 attached thereto.⁵ (Evid. Code, §§ 452, subd. (h), 453, 459, subd. (a); *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326; *Vons Companies, Inc. v. Seabest Foods, Inc.*

³ On April 4, 2018, we denied the joint motion of City and Playa Grande to consolidate the instant appeal with the appeal in case No. D072140, filed by La Jolla Shores Tomorrow (LJST), which also involves the Project. However, we granted their alternative motion to coordinate the appeals. Both cases have been decided by the same merits panel.

⁴ Those exhibits include: (1) minutes of the City Council meeting held on April 5, 2016; (2) a request from City's Development Services Department dated February 26, 2016, for City Council action; (3) a City staff report to the Planning Commission dated January 28, 2016 (only pages 1-30 and 67-68 thereof); (4) City Memorandum 533-4000 dated March 15, 2016; and (5) pages 1 through 10 of the strikeout ordinance from the minutes of the City Council meeting held on April 5, 2016.

⁵ On March 23, 2018, City and Playa Grande filed a joint conditional motion for judicial notice requesting that we take judicial notice of two exhibits attached thereto *only* in the event we granted Segal's motion for judicial notice. That motion is denied as moot.

(1996) 14 Cal.4th 434, 444, fn. 3; *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520.)

DISCUSSION

I. *THE MOTION TO DISMISS THE APPEAL IS DENIED*

City and Playa Grande filed a joint motion to dismiss the appeal as being untimely. In particular, they argue Segal's motion and amended motion to vacate the judgment and, in the alternative, for a new trial were procedurally deficient and therefore did not extend the time to appeal pursuant to California Rules of Court, rule 8.108(b) or (c).⁶ Opposing that motion, Segal requested that we take judicial notice of his motion and amended motion to vacate the judgment and, in the alternative, for a new trial.

A. Additional Procedural Background

On February 21, 2017, the trial court entered judgment for City. On February 22 City and Playa Grande jointly filed and served on Segal a notice of entry of judgment. On February 27 Segal filed a notice of motion to vacate the judgment and, in the alternative, for a new trial, including a memorandum of points and authorities and two supporting affidavits.⁷ On March 3 he filed a notice of amended motion to vacate the

⁶ All references to rules are to the California Rules of Court unless otherwise specified.

⁷ We hereby grant Segal's June 21, 2017 motion for judicial notice of the papers he filed relating to his motion to vacate the judgment and, in the alternative, for a new trial (exhibit 1) and his amended motion to vacate the judgment and, in the alternative, for a new trial (exhibit 2). (Evid. Code, §§ 452, subd. (d), 453, 459, subd. (a).)

judgment and, in the alternative, for a new trial, but omitted the supporting affidavits. On March 6 he submitted the supporting affidavits for his amended motion.

On April 7, 2017, the trial court denied Segal's amended motion on procedural and substantive grounds. In particular, the court concluded the notice of motion did not comply with sections 663a and 659 because it did not designate the grounds for the alternative motions. On May 3 Segal filed a notice of appeal.

B. The 60-Day Rule and 30-Day Extension

Rule 8.104(a)(1)(B) provides that a notice of appeal generally must be filed within 60 days after the appealing party is served with a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service.

However, that 60-day period to file a notice of appeal from a judgment may be extended in certain cases where postjudgment motions are denied. Rule 8.108(c) provides:

"If, within the time prescribed by rule 8.104 to appeal from the judgment, any party serves and files a *valid notice of intention to move*—or a valid motion—to *vacate the judgment*, the time to appeal from the judgment is extended for all parties until the earliest of:

"(1) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;

"(2) 90 days after the first notice of intention to move—or motion—is filed; or

"(3) 180 days after entry of judgment." (Italics added.)

Similarly, rule 8.108(b) provides:

"If any party serves and files a *valid notice of intention to move for a new trial*, the following extensions of time [to file an appeal] apply:

"(1) If the motion for a new trial is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

"(A) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;

"(B) 30 days after denial of the motion by operation of law; or

"(3) 180 days after entry of judgment." (Italics added.)

Section 663a, subdivision (a), provides: "A party intending to make a motion to set aside and vacate a judgment, as described in Section 663, shall file with the clerk and serve upon the adverse party *a notice* of his or her intention, *designating the grounds upon which the motion will be made*, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts" ⁸ (Italics added.) Similarly, section 659, subdivision (a), provides: "The party intending to move for a new trial shall file with the clerk and serve upon each adverse party *a notice* of his or her intention to move for a new trial, *designating the grounds upon which the motion will be made* and whether the same will be made upon affidavits or the minutes of the court, or both" ⁹ (Italics added.)

⁸ A notice of intent to move to vacate a judgment generally must be filed within 15 days after mailing by the court clerk, or service by a party, of a notice of entry of judgment, or within 180 days after the judgment is entered, whichever is earliest. (§ 663a, subd. (a)(2).)

⁹ A notice of intent to move for a new trial generally must be filed within 15 days after mailing by the court clerk, or service by a party, of a notice of entry of judgment, or within 180 days after the judgment is entered, whichever is earliest. (§ 659, subd. (a)(2).)

C. Notice of Appeal

City and Playa Grande assert that the extended periods under rule 8.108(b) and (c) do not apply because Segal's notice of intent to move to vacate the judgment and, in the alternative, for a new trial did not designate the grounds upon which those alternative motions would be made as required by sections 663a and 659 and, therefore, was not a "valid" notice within the meaning of either rule 8.108(b) or rule 8.108(c). Absent the application of a rule extending the time for appeal, City and Playa Grande argue that Segal was required to file his notice of appeal no later than 60 days after they served the notice of entry of judgment on him (i.e., on or before April 24, 2017). Because Segal did not file his notice of appeal until May 3, they argue his notice of appeal was untimely filed and we lack jurisdiction to consider it.

On the first substantive page of the notice of motion, Segal states that he "will move the court for an Order vacating the Judgment in the above entitled cause, or in the alternative, grant a new trial. Said Motion will be based upon this Notice, the Memorandum of Points and Authorities including Exhibits, attached hereto, the Declaration of [Segal] and Declaration of Phillip A. Merten, both of which are attached hereto, the briefs heretofore filed in this case, the transcript of the trial proceedings on January 5, 2017, and the pleadings and other papers on file in this case." On subsequent pages, the text of Segal's 13-page memorandum of points and authorities appears, followed by the two-page table of contents and one-page table of authorities for that memorandum (apparently filed out-of-sequence), as well as Segal's one-page declaration and Merten's four-page declaration. That memorandum of points and authorities cited

and argued Segal's specific grounds for a new trial (i.e., § 657(1), (3), (4), (6), & (7)). As relevant to the issue here, Segal's amended notice was identical.

City and Playa Grande argue that Segal's appeal should be dismissed because the one-page "notice" portion of his notice of motion and amended notice of motion did not expressly "designat[e] the grounds upon which [his motion to vacate judgment and alternative motion for new trial] will be made" and therefore were procedurally defective under sections 663a and 659 and not "valid" notices under rule 8.108(b) or (c) that could extend the usual 60-day appeal period after the notice of entry of judgment was served. They argue the notice of motion and amended notice of motion "failed to designate even a single ground upon which a motion for new trial or a motion to vacate a judgment could be made." They also argue those notices did not specify how the legal basis for the decision was not consistent with or supported by the facts.

However, although the notice of motion and amended notice of motion did not comply with sections 663a and 659, case law has long held that a notice of motion's technical noncompliance may be excused if it incorporates papers or other documents attached thereto that set forth the grounds for the motion. Importantly, in the context of motions for new trial, courts have held that the omission in a notice of motion of a particular ground will be disregarded if the supporting or accompanying papers set forth the grounds for the motion. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 19-20 [although notice of motion specified wrong ground for new trial, plaintiff timely apprised defendant of correct ground for new trial in timely filed memorandum of points and authorities]; *Girch v. Cal-Union Stores, Inc.* (1968) 268 Cal.App.2d 541, 548-549

[same]; *McFarland v. Kelly* (1963) 220 Cal.App.2d 585, 589 [same]; *Galindo v. Partenreederei M.S. Parma* (1974) 43 Cal.App.3d 294, 301-302 [although notice of motion specified wrong grounds for new trial, plaintiff timely-filed declaration apprising defendant of correct ground for new trial].) In the context of a trial court's authority to grant a motion for new trial, Witkin explains this case law, stating: "Generally, a motion for new trial can be granted only on a ground specified in the notice of intention to move. [Citation.] However, if the notice omits a ground, it may still be considered by the court if it is asserted in another document, such as the memorandum of points and authorities. [Citation.] For the court to grant the motion, the correct ground must be supplied before the filing period for the notice of intention to move has expired." (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 50, pp. 636-637.)

Likewise, in the context of analogous statutes that require notices to state grounds for motions, courts have held that the omission in a notice of motion of a particular ground for the motion will be disregarded if the supporting or accompanying papers set forth the grounds for the motion. (*Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1008, fn. 5 [§ 473; former rule 311(a)]; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125 ["An omission in the notice may be overlooked if the supporting papers make clear the grounds for the relief sought."; § 1010]; *Carrasco v. Craft* (1985) 164 Cal.App.3d 796, 808 [§ 473]; *Estate of Parks* (1962) 206 Cal.App.2d 623, 630-632 [§ 473]; *Tarman v. Sherwin* (1961) 189 Cal.App.2d 49, 51-52 [motion for change in venue]; *Bergloff v. Reynolds* (1960) 181 Cal.App.2d 349, 357-358 [§ 473]; *Ramey v. Myers* (1958) 159 Cal.App.2d 82, 85-86 [§ 675]; *Shields v. Shields* (1942) 55 Cal.App.2d

579, 583-584 [§ 1010]; *Savage v. Smith* (1915) 170 Cal. 472, 474 [§ 1010].) In *Savage v. Smith*, *supra*, 170 Cal. 472, the Supreme Court stated:

*"It is true that the notice of motion did not comply with the requirement of the rule, now embodied in section 1010 . . . , that the grounds of motion must be stated in the notice. . . . The notice, together with the records and affidavits therein referred to, were sufficient to apprise the plaintiff of the fact that the purpose of the proposed motion was to seek relief under section 473 . . . , and that the ground of the motion necessarily was the defendant's excusable neglect, which would justify relief under that section. The objection that the grounds of the motion were not stated in the notice was therefore properly disregarded."*¹⁰ (*Id.* at p. 474, italics added.)

Tarman v. Sherwin, *supra*, 189 Cal.App.2d 49, summarized the reasoning underlying these cases, stating:

"[A] long line of authority has held that affidavits accompanying a notice of motion [citations], other documents in the court file [citation], or affidavits and points and authorities filed with the notice [citation], at least when specifically referred to in the notice,

¹⁰ We are unpersuaded by City and Playa Grande's attempt to distinguish the notice requirements for motions under sections 663a and 659 from the analogous notice requirements of section 1010 and similar statutes. Section 1010 sets forth general procedures for filing motions, stating in pertinent part: "Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based." Section 1010's language is virtually identical to the language of sections 663a and 659 regarding the requirement that a notice of motion set forth the grounds upon which the motion will be made. Sections 663a and 659 both provide in pertinent part that a notice of motion under its provisions must "designat[e] the grounds upon which the motion will be made." Accordingly, there is no discernible difference between section 1010's language and sections 663a and 659's language regarding the requirement that a notice of motion state or designate the grounds upon which the motion will be made. Therefore, contrary to City and Playa Grande's argument, we interpret the notice requirements under sections 663a and 659 in the same manner as courts have long interpreted section 1010 and similar analogous statutes regarding requirements that notices of motion state or designate the grounds upon which the motions will be made.

may be considered in amplification of the grounds stated in the notice. We incline to this rule On principle, we are satisfied that a notice should be deemed adequate to meet the code requirements if it fairly advises opposing counsel of the issues to be raised. Documents which are referred to in the notice and attached to it may be considered in determining adequacy of the notice of motion. It seems completely clear that the notice here, incorporating by reference the affidavits and memorandum attached to it, serves this purpose." (*Id.* at pp. 51-52.)

The court stated: "There can be little doubt that the notice fully and fairly apprised plaintiff of movant's intention to assert and rely upon the previous order." (*Tarman v. Sherwin, supra*, 189 Cal.App.2d at p. 51.)

Accordingly, based on directly applicable case law interpreting section 659 notices of motions for new trial and indirectly applicable case law interpreting analogous statutes regarding notices of motions as cited and discussed *ante*, we conclude that if a notice of motion under section 663a or 659 refers to accompanying memorandum of points and authorities, affidavits, or other papers that set forth the specific grounds upon which the motion will be made, any omission from the notice of a statement expressly setting forth those specific grounds will be disregarded because the opposing party will be apprised of those grounds in the supporting papers referenced in the notice. (*Collins v. Sutter Memorial Hospital, supra*, 196 Cal.App.4th at pp. 19-20; *Girch v. Cal-Union Stores, Inc., supra*, 268 Cal.App.2d at pp. 548-549; *McFarland v. Kelly, supra*, 220 Cal.App.2d at p. 589; *Galindo v. Partenreederei M.S. Parma, supra*, 43 Cal.App.3d at pp. 301-302; *Savage v. Smith, supra*, 170 Cal. at p. 474; *Shields v. Shields, supra*, 55 Cal.App.2d at pp. 583-584; *Tarman v. Sherwin, supra*, 189 Cal.App.2d at pp. 51-52.) None of the cases cited by City and Playa Grande are apposite to this case or otherwise persuade us to reach

a contrary conclusion. (See, e.g., *Branner v. Regents of University of California* (2009) 175 Cal.App.4th 1043.)

Applying the principles of the cases discussed *ante* to the notice of motion and amended notice of motion in this case, we conclude those notices adequately designated the grounds upon which the motion to vacate judgment and alternative motion for new trial would be made. Each of those notices expressly stated that the motion "will be based upon this Notice, the Memorandum of Points and Authorities including Exhibits, attached hereto, the Declaration of [Segal] and Declaration of [Merten], both of which are attached hereto, the briefs heretofore filed in this case, the transcript of the trial proceedings on January 5, 2017, and the pleadings and other papers on file in this case." Our review of those referenced papers shows that they clearly set forth the grounds upon which the motions would be made. In particular, Segal's memorandum of points and authorities in support of those motions cited section 657(1) [irregularity in the proceedings], 657(3) [accident or surprise], 657(4) [newly discovered evidence], 657(6) [insufficiency of evidence], and 657(7) [error of law], as grounds for his motions. Accordingly, the notice of motion and amended notice of motion adequately apprised City and Playa Grande of the grounds upon which Segal would make his motions. In fact, City and Playa Grande were aware of those specific grounds because in their opposition memorandum they argued those specific grounds were inapplicable. Because those notices complied with section 663a and 659's requirements, they necessarily constituted "valid" notices of motion within the meaning of rules 8.108(b) and 8.108(c) that extended the usual 60-day appeal period after the notice of entry of judgment was

served. Under rule 8.108(c)(2), the usual appeal period under rule 8.104 was extended until 90 days after Segal filed his first motion to vacate judgment.¹¹ Because Segal filed that motion on February 27, 2017, he had until 90 days thereafter to file a notice of appeal (i.e., on or before May 29, 2017). Accordingly, the notice of appeal that he filed on May 3, 2017, was timely.

II. *VISIBILITY TRIANGLES*

Segal contends City did not proceed in the manner required by law because it approved the Project without requiring visibility triangles under section 113.0273 of the Municipal Code, which ordinance provides rules for measuring "visibility areas." In particular, he argues that ordinance required visibility triangles at the intersections of Calle Clara and the Project's driveways.

A. *Background*

In 2010 City staff requested that the hearing officer approve a variance from Municipal Code section 113.0273's provisions for the Project's driveways with Calle Clara. However, the hearing officer found no variance was necessary because that ordinance provided only rules for calculation and measurement of visibility triangles when a specific ordinance or regulation required visibility triangles, but there was no specific provision of the La Jolla Shores Planned District Ordinance (PDO) (Mun. Code, § 1510.0101 et seq.) or other Municipal Code provision requiring visibility triangles for

¹¹ Because neither the record on appeal nor the register of actions shows that either the court clerk or a party served a copy of the order denying Segal's first motion to vacate judgment, the 30-day extended period under rule 8.108(c)(1) does not apply.

the Project. The hearing officer reasoned that Municipal Code section 113.0273, which is part of chapter 11 of the Municipal Code, "exists to give guides to those people who are designing projects and enforce regulations. [¶] It's there to tell you how to implement a requirement. It tells you how to measure things. It's not a portion of the [Municipal Code] that tells you to do something. So unless you can point to a place in the [PDO] that says that visibility triangles are required for this site, I don't see where one is required." He stated: "All I see is that the measurement and visibility area section for rules and calculations tells you how to do it. [¶] I don't see anything that triggers it and makes it a requirement that needs to be done." Accordingly, the hearing officer denied City's request for a variance because a variance from Municipal Code section 113.0273 was not required for the Project.

Thereafter, the Planning Commission approved the Project's entitlements and subsequently reaffirmed those approvals after the City Council granted appeals under CEQA and returned review of the Project back to it. At each hearing, the Planning Commission heard and considered arguments by Segal and others that Municipal Code section 113.0273 and the PDO required visibility triangles for the Project. In particular, at its 2010 hearing, when a planning commissioner asked a City staff member if any properties on Calle Clara were required to have visibility triangles, the staff member replied that none of the properties on the south side of Calle Clara had visibility triangles.¹² It was also noted that the south side of Calle Clara, which was originally

¹² The Project's north side is located on the south side of Calle Clara.

dedicated as a public right of way in 1926, had a zero lot line for adjacent properties, low or no curbs, and no sidewalks. In its penultimate April 16, 2015 resolution approving the Project's entitlements, the Planning Commission found the Project complied with all applicable regulations of City's Land Development Code (i.e., chapters 11, 12, 13, & 14 of the Municipal Code [per Mun. Code, § 111.0101, subd. (a)]) and did not propose any deviations therefrom. After the City Council denied the subsequent appeal, Segal filed the instant writ petition, again asserting that Municipal Code section 113.0273 requires the Project to include visibility triangles and, in particular, at the intersections of Calle Clara and the Project's driveways. In its order denying the petition, the trial court concluded that City properly concluded section 113.0273 of the Municipal Code did not require visibility triangles for the Project. The court stated:

"Section 113.0273 [of the Municipal Code] acts to clarify and define the manner in which development regulations are applied. City staff reasonably interpreted the various Municipal Code sections [e.g., Municipal Code sections 113.0201, 113.0202, 113.0273] such that they properly determined that a variance was not required for the Project. The [PDO] does not require visibility triangles. The determination that Calle Clara does not meet the minimum requirements for classification as a street, and instead functions as an alley, is supported by substantial evidence. This determination relies on a correct interpretation of the subject Municipal Code sections. As a result, the visibility triangle guidelines set forth within [Municipal Code] section 113.0273[, subdivision] (c) do not apply."

Accordingly, the court denied the petition.

B. Interpretation of Statutes

"Ultimately, the interpretation of a statute is a legal question for the court to decide, and an administrative agency's interpretation is not binding." (*Sara M. v. Superior*

Court (2005) 36 Cal.4th 998, 1011.) Nevertheless, a past or contemporaneous construction of a statute by an administrative agency is entitled to great weight unless that construction is clearly erroneous or unauthorized. (*Id.* at p. 1012; *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 657-658; *Zenker-Felt Imports v. Malloy* (1981) 115 Cal.App.3d 713, 720.) Likewise, the interpretation of an ordinance or other legislation by its enacting body "is of very persuasive significance." (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021.)

"Courts must . . . independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

"Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given—is fundamentally *situational*." (*Id.* at p. 12.) In those situations in which an " 'agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion,' " courts are " 'more likely to defer to an agency's interpretation of its own regulation than to [their] interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' " (*Ibid.*)

Greater deference is also given to interpretations by agencies where there are indications that senior agency officials have carefully considered those interpretations. (*Id.* at p. 13.)

C. *Municipal Code Section 113.0273*

Segal argues that Municipal Code section 113.0273 operates independently as a regulation requiring visibility triangles where Calle Clara intersects the Project's driveways. We disagree.

Article 3 of chapter 11 of the Municipal Code provides definitions for land development terms and rules for calculation and measurement when applicable land development regulations include certain terms or concepts. (Mun. Code, §§ 113.0101, 113.0201, 113.0202.) Municipal Code section 113.0201 provides:

"The purpose of this division [i.e., Municipal Code, chapter 11, article 3, division 2] is to clarify and define the manner in which specific land development terms and development regulations are applied. The intent is to provide the rules for calculating, determining, establishing, and measuring those aspects of the natural and built environment that are regulated by the Land Development Code [i.e., Municipal Code, chapters 11, 12, 13, & 14]." (Italics added.)

Importantly, Municipal Code section 113.0202 provides:

"This division [i.e., Municipal Code, chapter 11, article 3, division 2] applies to development when the applicable regulations include terms or concepts that are shown in Table 113-02A. The Rules for Calculation and Measurement [i.e., Municipal Code, chapter 11, article 3, division 2] clarify development regulations and land development terms by expanding on the regulations and providing detailed explanations of pertinent aspects of the regulation. These rules govern the way in which the development regulations are implemented. The land development terms and the sections for the corresponding rules are provided in Table 113-02A. The Rules for Calculation and Measurement of one regulation or term may be used in conjunction with another." (Italics added.)

The express language of Municipal Code sections 113.0201 and 113.0202 clearly shows that the provisions of division 2 of article 3 of chapter 11 of the Municipal Code

(i.e., "Rules for Calculation and Measurement") do *not* apply *unless* there is a specific development regulation that applies to a development project and includes terms or concepts set forth in Table 113-02A, which is part of Municipal Code section 113.0202. Alternatively stated, none of the provisions of division 2 of article 3 of chapter 11 of the Municipal Code apply independently to a development project in the absence of an underlying development regulation found elsewhere in the Land Development Code that applies to a particular development project. Absent a substantive development regulation found outside of division 2 of article 3 of chapter 11 of the Municipal Code that expressly applies to and requires visibility triangles for a specific project, Municipal Code section 113.0273 does not apply to that project.

Accordingly, contrary to Segal's assertion, Municipal Code section 113.0273, which is included within division 2 of article 3 of chapter 11 of the Municipal Code, does *not* apply independently to require visibility triangles for the Project. Table 113-02A, which is part of Municipal Code section 113.0202, lists certain land development terms and concepts for which division 2 provides rules for their calculation and measurement and then identifies the respective division 2 ordinance that provides those rules. Table 113-02A includes the term "[v]isibility area" as one such term or concept and identifies Municipal Code section 113.0273 as the division 2 ordinance that provides rules for calculation and measurement of visibility areas.

Municipal Code section 113.0273, titled "Measuring Visibility Area," provides:

"The *visibility area* is a triangular portion of a *premises* formed by drawing one line perpendicular to and one line parallel to the *property line* or *public right-of-way* for a specified length and one

line diagonally joining the other two lines, as shown in Diagram 113-02SS. [¶] . . . No *structures* may be located within a *visibility area* unless otherwise provided by the applicable zone or the regulations in Chapter 14, Article 2 (General Development Regulations). [¶] . . .

" . . . For *visibility areas* at the intersection of a *street* and driveway, one side of the triangle extends from the intersection of the *street* and the driveway for 10 feet along the *property line*. The second side extends from the intersection of the *street* and driveway for 10 feet inward from the property line along the driveway edge and the third side of the triangle connects the two."¹³

Although Municipal Code section 113.0273 includes certain language that is regulatory (i.e., "No *structures* may be located within a *visibility area* . . ."), that language must be construed in the context of Municipal Code sections 113.0201 and 113.0202, as discussed *ante*. Accordingly, contrary to Segal's assertion, Municipal Code section 113.0273 does not apply independently to require visibility triangles for the Project.¹⁴ Rather, there must be an underlying development regulation outside of division 2 of article 3 of chapter

¹³ Although not relevant to Segal's arguments on appeal, Municipal Code section 113.0273 also provides: "(1) For *visibility areas* at the intersection of *streets*, two sides of the triangle extend along the intersecting *property lines* for 25 feet and the third side is a diagonal line that connects the two. [¶] (2) For *visibility areas* at the intersection of a *street* and *alley*, two sides of the triangle extend along the intersecting *property lines* for 10 feet and the third side is a diagonal line that connects the two."

¹⁴ Likewise, Segal's assertion that Municipal Code section 113.0273 is a "regulatory" ordinance does not persuade us that it applies to the Project independently of any underlying substantive development regulation that applies to the Project. Rather, assuming *arguendo* that ordinance is "regulatory" within the broad meaning of that term, the language of Municipal Code sections 113.0201 and 113.0202, as discussed *ante*, clearly shows that Municipal Code section 113.0273 does not operate independently to require visibility areas or triangles absent a separate, underlying development regulation that requires visibility areas or triangles for the Project.

11 of the Municipal Code that applies to the Project and requires the Project to have visibility triangles. However, Segal has not cited, nor have we found, any such underlying development regulation.

In particular, the PDO does not contain any such requirement for development in the La Jolla Shores Planned District. Had City intended to require development within that district to have visibility areas or triangles, it presumably knew how to do so and would have included such requirement in the PDO. For example, the La Jolla Planned District Ordinance (not to be confused with the La Jolla Shores Planned District Ordinance) expressly requires visibility areas in zones 5 and 6 of that neighboring community.¹⁵ Therefore, by omitting such requirements from the PDO and other substantive provisions of the Municipal Code applicable to the La Jolla Shores Planned District, we, like the trial court, infer City intended that development in that district *not* be required to have visibility areas or triangles. Accordingly, without any such underlying development regulation applicable to the Project, Municipal Code section 113.0273 does not apply. Therefore, we conclude the trial court correctly found that a

¹⁵ Municipal Code section 159.0402, subdivision (b) provides: "Zones 5 and 6— Within every premises in Zones 5 and 6 there shall be established visibility areas adjacent to every street corner intersection, driveway (on or off premises) and alley. These triangular areas shall be of the size, shape and location shown in Appendix F. Within a visibility area, no portion of any fence, wall or other structure shall exceed three feet in height." Furthermore, at the January 5, 2017 hearing on Segal's petition, Suzanne Varco, Playa Grande's counsel, represented to the trial court that the Municipal Code expressly requires visibility triangles in other planned districts (e.g., Mid-City Communities Planned District, Golden Hill Planned District, Mount Hope Planned District, and La Jolla Planned District).

variance from the application of Municipal Code section 113.0273 was not required for the Project.

D. *Calle Clara Is Not a "Street"*

Assuming arguendo that Municipal Code section 113.0273 applies notwithstanding the absence of any underlying development regulation applicable to the Project, we nevertheless conclude that City properly found that ordinance did not apply to the intersections of Calle Clara and the Project's driveways because Calle Clara is not a street and instead functions as an alley. We, like the trial court below, conclude there is substantial evidence to support that finding.

In response to public comments on the FEIR regarding the absence of visibility triangles, City stated:

"Calle Clara is 30 feet wide. Pursuant to the definition of an alley in [Municipal Code] Section 113.0103, an alley is a maximum of 25 feet wide. However, pursuant to the City's Street Design Manual (page 11), an alley is 20 feet wide, but may be wider to accommodate utilities. Utilities are located in Calle Clara. Accordingly, the fact that Calle Clara is 30 feet wide is not the only factor to be used in determining whether it is an alley. The narrowest double-loaded street as defined in the City's Street Design Manual is a minimum of 30 feet from curb-to-curb with a minimum 50-foot right of way plus sidewalks [citation]. Calle Clara does not have a 50-foot right of way nor does it have sidewalks or curbs on the south side where the [P]roject is located. Consequently, *Calle Clara does not meet the minimum requirements for classification as a street.*

"Calle Clara's public right of way, on the north side and rear of the [P]roject site, was established along with the original block's Subdivision Map No. 1913, La Jolla Shores Unit No. 1, June 1, 1926, with the dedication of 10 feet for an unnamed public right of way (approximately 1/2 width of an alley) between Paseo del Ocaso and El Paseo Grande. Typical of an alley, the [P]roject site's entire

block is currently developed as such with zero lot line development along the alley. Later, Subdivision Map No. 2061, La Jolla Shores Unit No. 3, Sept. 26, 1927, was recorded for the proposed subdivision on the north side of this unnamed alley. This subdivision map required the additional dedication of 20 feet of public right of way (approximately 1/2 width of a street) and identified the total 30 feet of public right of way as 'Calle Clara.' This subsequent subdivision's development produced street side features such as curb and gutter along portions of the north side of Calle Clara. *The combination of the two subdivision requirements has created a public right-of-way street with both street and alley features and does not meet the standards in the City's Street Design Manual for a street.* Technically, the northern 'half' of Calle Clara is 20 feet wide while the southern 'half' is only 10 feet wide. There are curbs along a small portion of the northern side of Calle Clara, but not on the south side. Development along the southern side observes a zero-foot setback as allowed in the [PDO]. Garage doors for all development on the south side of Calle Clara are located on the property line and none observe the visibility triangles pursuant to Municipal Code Section 113.0273. *Calle Clara has therefore traditionally functioned as an alley, not a street.*

"Considering the unique situation and the existing development all along the southern side of Calle Clara observing a zero-foot setback as allowed in the [PDO], *the City Engineer has reviewed the [P]roject as proposed with zero-setback and consider[s] Calle Clara to be functioning as an alley rather than a street.* According to [Municipal Code] Section 113.0273, 'for visibility areas at the intersection of a street and alley, two sides of the triangle extend along the intersecting property lines for 10 feet and the third side is a diagonal line that connects the two.' *Therefore, [Municipal Code] Section 113.0273[, subdivision] (a) would not be applicable to the [P]roject.*" (Italics added.)

As quoted *ante*, Municipal Code section 113.0273, subdivision (b)(3) provides that for required "*visibility areas* at the intersection of a *street* and driveway, one side of the triangle extends from the intersection of the *street* and the driveway for 10 feet along the *property line*." Therefore, by its express terms, that provision for calculating and

measuring visibility areas does not apply unless there is an intersection of a "street" with a driveway.

Under section 1094.5, we review the trial court's decision denying Segal's petition for writ of mandate, and thus City's decision and its findings on disputed facts, for substantial evidence to support them. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057-1058; *Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1590; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515 ["Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision."].) Substantial evidence must be of ponderable legal significance and reasonable in nature, credible, and of solid value. (*JKH Enterprises, Inc.*, at p. 1057.) In applying the substantial evidence standard of review, we resolve all conflicts in the evidence and draw all reasonable inferences in support of City's decision and its factual findings. (*Id.* at p. 1058.) City's determination whether a particular public right-of-way constitutes a "street" within the meaning of Municipal Code section 113.0273 involves a weighing of the unique circumstances of a specific right-of-way in light of City's expertise and technical knowledge and therefore is primarily a factual, not legal, determination. Accordingly, the substantial evidence standard applies to our review of City's determination that Calle Clara is not a "street" within the meaning of Municipal Code section 113.0273. Because neither those facts nor

the reasonable inferences drawn therefrom are undisputed, City's determination does not involve a pure question of law that would be subject to de novo review. (Cf. *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867.)

Contrary to Segal's assertion, there is substantial evidence to support City's finding that Calle Clara is not a "street" within the meaning of Municipal Code section 113.0273. Segal notes that Municipal Code section 113.0103 defines an "[a]lley" as "a public way that is no wider than 25 feet that is dedicated as a secondary means of access to an *abutting property*." Based on that definition, he argues that because Calle Clara is 30 feet wide and therefore exceeds the maximum width (i.e., 25 feet) set forth in the Municipal Code's definition of an alley, Calle Clara must necessarily be considered a "street" within the meaning of Municipal Code section 113.0273. We disagree.¹⁶

The proper analysis must begin with the Municipal Code's definition of "street" and any Municipal Code or other City guidelines for street design. Municipal Code section 113.0103 defines a "[s]treet" as "that portion of the *public right-of-way* that is dedicated or condemned for use as a public road and includes highways, boulevards, avenues, places, drives, courts, lanes, or other thoroughfares dedicated to public travel, but does not include *alleys*." Accordingly, contrary to Segal's contention, a public right-of-way that is not an alley is not necessarily a "street." Rather, only a public right-of-way

¹⁶ To the extent Segal argues the trial court erred by concluding his petition sought relief only for administrative mandate under section 1094.5 and not alternatively for traditional mandate under section 1085, his petition fails under either theory of relief for the reasons discussed *post*. Accordingly, Segal is not entitled to any writ relief.

that is dedicated or condemned for use as a public road (e.g., a thoroughfare dedicated to public travel) may be considered a "street" within the meaning of Municipal Code section 113.0103. Furthermore, in determining the meaning of a "street" under Municipal Code section 113.0273, City properly considered its Street Design Manual. City and Playa Grande represent, and Segal does not dispute, that the narrowest right-of-way for a street allowed by City's Street Design Manual is 48 feet wide.

Given the above criteria for a "street," City then applied those criteria to the unique circumstances of Calle Clara and determined it was not a "street" within the meaning of Municipal Code section 113.0273 and, instead, functioned as an "alley" even though it exceeded the 25-foot width limitation for an alley under Municipal Code section 113.0103. This finding is supported by substantial evidence. Calle Clara was only 30 feet wide, had a zero lot-line for properties on its south side, low or no curbs, and no sidewalks. On June 1, 1926, 10 feet of Calle Clara, comprising its southern "half," was dedicated for a public right of way and its adjacent properties were developed with a zero lot line. As City noted, garage doors for all development on the south side of Calle Clara are located on the property line and none of the properties thereon have visibility triangles. Based on those circumstances, City concluded that Calle Clara has traditionally functioned as an alley, and not a street, and therefore found that Municipal Code section

133.0273's provisions regarding visibility areas or triangles do not apply to the intersections between Calle Clara and the Project's driveways.¹⁷

Furthermore, we are unpersuaded by Segal's alternative argument that regardless of whether Calle Clara is a street, City necessarily should have required visibility triangles for the Project's driveways after weighing public safety considerations. The administrative record shows City implicitly, if not expressly, weighed public safety considerations by requiring, inter alia, cars to exit the Project's garages or parking spaces facing forward into Calle Clara, traffic calming devices on Calle Clara, enhanced crosswalks, and a voluntary visibility triangle at Calle Clara's intersection with El Paseo Grande. Based on our review of the record, we cannot conclude City necessarily should have also required visibility triangles where the Project's garages or parking spaces intersected with Calle Clara.

III. MEANINGFUL PUBLIC PARTICIPATION

Segal contends that City violated CEQA's requirement for meaningful public participation because Municipal Code section 1510.0301, subdivision (b) does not

¹⁷ To the extent Segal cites evidence that would have supported a finding by City that Calle Clara is a street, he misconstrues and/or misapplies the substantial evidence standard of review. (*JKH Enterprises, Inc. v. Department of Industrial Relations, supra*, 142 Cal.App.4th at p. 1058.) Furthermore, to the extent the determination whether Calle Clara is a street within the meaning of Municipal Code section 113.0273 involves instead a question of law for our independent determination, we nevertheless would have reached the same conclusion as City did had we reviewed that question de novo in the circumstances of this case.

provide any floor area ratio (FAR) maximum for development within the La Jolla Shores Planned District.

A. Background

In the second cause of action of his petition, Segal alleged that if the Municipal Code were interpreted to allow construction of the Project, it would constitute unlawful spot zoning because the La Jolla Shores neighborhood would be the only beach community in City where FAR maximums would not apply. In his third cause of action for declaratory relief, he alleged that the Project's "FAR ratio of 2.37 vastly exceeds the City-wide FAR maximum of 1.75 for mixed-use buildings in Neighborhood Commercial zones. The City contends that the City-wide FAR maximums do not apply in La Jolla Shores. [¶] . . . [Segal] contends that the City-wide FAR maximums apply to La Jolla Shores." In particular, that cause of action alleged:

"54. [Municipal Code] Section **1510.0301[subdivision] (b)** states: 'No structure shall be approved which is substantially like any other structure located on an adjacent parcel. Conversely, no structure will be approved that is so different in quality, form, materials, color, and relationship as to disrupt the architectural unity of the area.' [Segal] contends that the Project would violate the aforementioned Section in that it would be so different in quality, form, materials, color, and relationship to the adjacent parcel so as to disrupt the architectural unity of the area. In addition, [Segal] contends that with an FAR of 2.37, the massiveness of the Project would be vastly different in form from the adjacent parcel, which has an FAR of 1.7.

"55. [Segal] contends that there is no rational basis to have a 1.7 FAR in the **La Jolla** PDO for a mixed-use building, and have no FAR maximum provision at all in the **La Jolla Shores** PDO for a mixed-use building. Therefore, [Segal] contends that either the City-wide FAR maximum of 1.75 applies to the Project[], or the La Jolla Shores PDO provisions allowing a commercial building at the site of the Project to occupy 100 percent of the lot is unconstitutional, as

being capricious and irrational spot zoning. . . . City contends that there is a rational basis for having an FAR maximum in La Jolla, and none in La Jolla Shores."

The petition did *not* allege any violation of CEQA based on a lack of meaningful public participation relating to Municipal Code section 1510.0301 or the lack of a FAR maximum in the Municipal Code or PDO for the La Jolla Shores Planned District.

In denying Segal's petition, the trial court rejected Segal's claim of unlawful spot zoning. Citing *Viso v. State of California* (1979) 92 Cal.App.3d 15, 22, the trial court concluded that Segal could not state a claim for unlawful spot zoning because he did not own a property that was given lesser rights than surrounding property and, in any event, there was no evidence showing approval of the Project occurred because of favorable zoning applicable only to the Project.

The trial court also addressed issues of the Project's design, including its scale and bulk.¹⁸ Citing Municipal Code section 1510.0301, subdivision (b), the court stated that the evidence "demonstrates a variety of commercial and residential structures within a few city blocks, including multi-unit residential dwellings, small commercial spaces and a 38,000-square foot, four story office building. Existing development in the area is an eclectic mix of sizes, scales, and styles. The Court has reviewed this record and finds that the [Project] is consistent with the surrounding community development and the PDO development requirements. . . . Thus, substantial evidence exists within the record

¹⁸ In its order denying Segal's petition, the court stated that its related ruling denying LJST's separate petition for writ of mandate was "expressly incorporated into this ruling [on Segal's petition] via this reference."

demonstrating that the [Project] complies with the PDO and the La Jolla Community Plan. The [P]roject is consistent with all of the policies of the PDO and the La Jolla Community Plan."

B. Public Participation Generally

"[P]ublic participation is an 'essential part of the CEQA process.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights*)). The purpose of an environmental impact report (EIR) "is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made." (*Ibid.*, italics omitted.) California Code of Regulations, title 14, section 15201, sets forth requirements for public participation, stating: "Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities." (Cal. Code Regs., tit. 14, § 15201.) An EIR's failure to disclose significant environmental impacts or other relevant environmental information regarding a project has been held to deprive the public of meaningful participation under CEQA. (See, e.g., *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884-885; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1458, 1460; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354-1357.)

C. *Waiver of New Theory on Appeal*

In his opening brief, Segal asserts: "The lack of any maximum [floor area] ratio [FAR] coupled with the unenforceable standard of [Municipal Code] section 1510.0301[, subdivision] (b) violated CEQA as the City processed the Project because Segal and the public were denied meaningful participation." However, City and Playa Grande argue that Segal did not raise that contention in the trial court and should therefore be precluded from raising it on appeal. We agree.

"[I]ssues not raised in the trial court cannot be raised for the first time on appeal." (*Estate of Westerman* (1968) 68 Cal.2d 267, 279.) In general, we cannot consider matters not raised in the trial court. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997; *People v. Gams* (1997) 52 Cal.App.4th 147, 155; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 ["a litigant may not change his or her position on appeal and assert a new theory"].) An exception to that general rule applies "when the issue presented involves purely a legal question, on an *uncontroverted record and requires no factual determinations*." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847.) In such an exceptional case, we have discretion to consider the new theory on appeal. (*Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1275, fn. 3 ["Whether an appellate court will entertain a belatedly raised legal issue always rests within the court's discretion."]; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767 [discretion not exercised]; *Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 1386 [discretion exercised].)

As discussed *ante*, Segal's petition alleged: (1) City's approval of the Project resulted in unlawful spot zoning; (2) its purported City-wide FAR maximum should apply to the La Jolla Shores Planned District, including the Project; and (3) the Project would violate Municipal Code section 1510.0301, subdivision (b) in that the Project would be so different in quality, form, materials, color, and relationship to its adjacent parcel as to disrupt the architectural unity of the area. The petition did *not* allege the public was denied meaningful participation in violation of CEQA based on the lack of any maximum FAR for the La Jolla Shores Planned District (which includes the Project) and/or a purported unenforceable standard under Municipal Code section 1510.0301, subdivision (b). Therefore, Segal's new theory asserting denial of meaningful public participation cannot be raised for the first time in this appeal. (*Estate of Westerman*, *supra*, 68 Cal.2d at p. 279; *Nellie Gail Ranch Owners Assn. v. McMullin*, *supra*, 4 Cal.App.5th at p. 997; *People v. Gams*, *supra*, 52 Cal.App.4th at p. 155; *Brown v. Boren*, *supra*, 74 Cal.App.4th at p. 1316.)

Contrary to Segal's assertion, his new theory does not involve purely a legal question on an uncontroverted record that requires no factual determinations. (Cf. *Mattco Forge, Inc. v. Arthur Young & Co.*, *supra*, 52 Cal.App.4th at p. 847.) As City and Playa Grande argue, Segal's new theory involves a mixed question of law and fact that requires factual determinations and therefore is not appropriate for an appellate court to decide for

the first time on appeal.¹⁹ Contrary to Segal's assertion, his new theory does not simply provide additional support for an issue that he raised below or an issue that he has not waived. (Cf. *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251 ["We are aware of no prohibition against citation of new *authority* in support of an *issue* that was in fact raised below."]; *Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1505, fn. 11 ["Where an appellant has not waived his right to argue an issue on appeal, he is free to cite new authority in support of that issue."].) Accordingly, we need not, and do not, decide the merits of that new theory.

D. Meaningful Public Participation

Assuming arguendo that Segal can raise his new theory on appeal, we nevertheless conclude that Segal and the public were not denied meaningful public participation as he asserts. Municipal Code section 1510.0301, subdivision (b), which is part of the PDO for the La Jolla Shores Planned District, is entitled "Design Principle" and provides:

"Within the limitations implied above, originality and diversity in architecture are encouraged. The theme 'unity with variety' shall be a guiding principle. Unity without variety means simple monotony; variety by itself is chaos. No structure shall be approved which is substantially like any other structure located on an adjacent parcel. Conversely, no structure will be approved that is so different in quality, form, material, color, and relationship as to disrupt the architectural unity of the area."

¹⁹ Segal's theory would involve mixed questions of law and fact, such as the FAR maximums for other communities in City, whether a maximum FAR for the La Jolla Shores neighborhood is required and, if so, what that maximum FAR is, and whether meaningful public participation occurred in the absence of a maximum FAR.

Segal argues that City violated CEQA because in certifying the FEIR the public was denied meaningful participation by Municipal Code section 1510.0301, subdivision (b)'s lack of a maximum FAR and its subjective and unenforceable standards that do not address the scale and bulk of development projects. He posits that his argument "is probably a case of first impression in which the law, rather than the project, is unstable, misleading, and impossible for the public to apply." He argues that by its subjective language, Municipal Code section 1510.0301, subdivision (b) does not objectively quantify the scale and bulk of projects within the La Jolla Shores Planned District as the Municipal Code does for other communities by setting forth maximum FAR's for projects, and therefore the public could not meaningfully participate on the issue of the scale and bulk of the Project.

City and Playa Grande respond by first noting that Segal failed to cite any legal authority to support his novel proposition that subjectivity in City's regulations for the scale and bulk of projects in the La Jolla Shores Planned District effectively denied the public meaningful participation in the CEQA process. They argue that there was, in fact, meaningful public participation on the scale and bulk of the Project, noting that members of the public commented on the Project's scale and bulk, community character, FAR, and related issues at least 93 times during the five-year CEQA review process and that its scale and bulk was heavily scrutinized. They also note the FEIR discussed the scale and bulk of the La Jolla Shores neighborhood, as well as that of the Project. Although the PDO does not contain any FAR maximum, they argue the Project is not an outlier when considering the FAR's of nearby buildings. While the Project's FAR is 2.16, buildings

within the La Jolla Shores area have FAR's ranging from 0.6 to 3.6. While the Project will be three stories high, buildings in the immediate vicinity of the Project are generally between two and four stories high. The Project complies with Municipal Code section 1510.0310, subdivision (b)'s building height limit of 30 feet. Therefore, City and Playa Grande argue that, contrary to Segal's assertion, the administrative record shows there was meaningful public participation regarding the scale and bulk of the Project as required by CEQA despite Municipal Code section 1510.0301, subdivision (b)'s lack of a maximum FAR and its subjective design standards.

We agree with City and Playa Grande's arguments and reject Segal's argument that City violated CEQA by denying the public meaningful participation regarding the Project's scale and bulk. In particular, we decline to create a new and expansive interpretation of CEQA's provisions by, in effect, concluding that municipalities like City must adopt objective development regulations, including maximum FAR's for projects, in order to comply with CEQA's requirement for meaningful public participation.

IV. CUMULATIVE IMPACTS

Segal contends that City violated CEQA because the FEIR did not adequately address the cumulative impacts of the Project. In particular, he argues the Project would set a precedent for development in the La Jolla Shores neighborhood and City should have considered the cumulative impact of future development projects that likely would be triggered by the Project.

A. EIR and Impacts of the Project

"[A]n EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights, supra*, 47 Cal.3d at p. 396.) A project will have a significant effect on the environment if "the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (Cal. Code Regs., tit. 14, § 15065, subd. (a)(3).) An EIR must discuss the cumulative impacts of a proposed project "when the project's incremental effect is cumulatively considerable, as defined in section 15065[, subdivision] (a)(3)." (Cal. Code Regs., tit. 14, § 15130, subd. (a).) An EIR's discussion of a project's cumulative impacts should be guided by standards of practicality and reasonableness. (Cal. Code Regs., tit. 14, § 15130, subd. (b).) "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects." (Cal. Code Regs., tit. 14, § 15355, subd. (b).)

However, CEQA does not require that an EIR discuss "specific future action that is merely contemplated or a gleam in a planner's eye." (*Laurel Heights, supra*, 47 Cal.3d at p. 398.) "[M]ere awareness of proposed expansion plans or other proposed development" (*Gray v. Madera* (2008) 167 Cal.App.4th 1009, 1127) does not constitute a

"probable future project" (*ibid.*) under California Code of Regulations, title 14, section 15130, subdivision (b)(1)(A). (*Gray*, at p. 1127.) Importantly, where future development is unspecified and uncertain, no purpose is served by requiring an EIR to speculate as to the future environmental consequences of a project. (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 503.)

B. FEIR and Potential Cumulative Impact

Although Segal argues that City should have considered the cumulative impact of future development projects that likely would be triggered by the Project, he fails to identify any reasonably foreseeable probable future projects that would be so triggered and should have been considered by City. Rather, he engages in speculation by arguing that other property owners in the vicinity of the Project probably would use City's approval of the Project to develop their properties with a scale and bulk similar to the Project's scale and bulk. That speculation is insufficient to constitute awareness of a proposed future project, much less a probable future project that City must consider in weighing the cumulative impacts of the Project. (*Gray v. County of Madera, supra*, 167 Cal.App.4th at p. 1127.)

As City and Playa Grande assert, the FEIR discussed the Project's potential cumulative effects regarding the specific environmental issues addressed therein and found that the Project did not have the potential to result in any cumulative considerable effect regarding those issues. In particular, the FEIR considered existing and future projects in the vicinity of the Project. At the time, the Project was the only proposed

mixed-use project in the area. Our review of the record shows there is substantial evidence to support City's finding that the Project will not have significant cumulative impacts regarding future projects in the area. Although the Project may, as Segal argues, set a "precedent" for future projects, the FEIR was not required to consider the potential cumulative impact of future projects that are merely speculative, but only that of reasonably foreseeable probable future projects. Because the Project was the only proposed mixed-use project at the time of the FEIR, it could not cause any cumulative impact on other reasonably foreseeable probable future projects.²⁰ Segal has not carried his burden on appeal to show otherwise.

DISPOSITION

The judgment is affirmed. City of San Diego and Playa Grande, LLC, shall recover their costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.

²⁰ Segal concedes "there are no other projects in the pipeline."